U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581

MICHELLE HILLPOT Complainant, v. TERRY JAMES DORRITY and FIDELITY PLANNING GROUP, Respondents.	*	CFTC Docket No. 08-RO31

OPINION ON SUMMARY DISPOSITION DISMISSING THE COMPLAINT

On September 8, 2008, respondents Terry Dorrity and Fidelity Planning Group moved to dismiss Michelle Hillpot's complaint with prejudice[1] on the ground that she had already settled her claims against them. The respondents attached the settlement and release agreement; it clearly and concisely releases them in exchange for $3,537.18.[2] It includes Hillpot's signature.[3] Hillpot did not respond to the motion to dismiss.

[1] Renewed Motion by Both Respondents to Dismiss Complaint with Prejudice, dated September 8, 2008 ("Motion to Dismiss").

[2] Motion to Dismiss, Exhibit A. The payment is in two parts. Hillpot's account balance was negative by $1,537.18. The settlement and release covered this deficit and additionally gave Hillpot $2,000.00.

[3] *Id.*

Despite the respondents' *prima facie* defense,[4] and what seems to be an admission that Hillpot signed the release,[5] we denied their motion to dismiss.[6] We reasoned that other of Hillpot's statements, which were at best ambiguous as to the release's authenticity, were sufficient to overcome the respondents' motion in light of the Commission's extremely liberal pleading standard[7] – a

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[4] *See Cunningham v. Parker,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,780 at 61,677 (CFTC Feb. 26, 2008) (holding that the complainant executed a valid settlement and release and thus lacks standing to pursue additional relief regarding the same transaction).

[5] Complaint, dated May 1, 2008 ("Complaint"), at 5 (stating that "I was advised by a lawyer that since I signed the release and settlement agreement, I was not able to pursue a lawsuit for my losses").

[6] *Hillpot v. Dorrity,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,931 at 62,325 (CFTC Oct 10, 2008).

[7] *See Alexander v. First Sierra Commodity Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,058 at 41,396 (CFTC April 19, 1994); *Alexander v. First Sierra Commodity Corp.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,467 at 43,057-58 (CFTC July 27, 1995). Alexander's attorney filed a form complaint (at times confusing even the complainant's gender) that included none of the specific facts required under 17 C.F.R. §12.13(b). For instance, Rule 12.13(b)(iv) requires a complaint to include "A complete description of complainant's case, including . . . [a] description of all relevant facts concerning each and every act or omission which it is claimed constitutes a violation of the Act." Given an opportunity to amend and directed explicitly to submit facts that satisfied the rule, the complainant failed to adequately comply; there remained a paucity of specific facts to support his claim. Accordingly, the case was dismissed *sua sponte. See Alexander,* [1992-1994 Transfer Binder] ¶26,058 at 41,396. On appeal, the Commission remanded and held that pleading with particularity was not required or necessary to give a respondent fair notice and that it was incompatible with the "informal nature of the reparations process." *See Alexander,* [1994-1996 Transfer Binder] ¶26,467 at 43,057-58.

consequence of its disinclination to enforce its published rules of procedure against *pro se* parties.[8]

We further noted that prior settlement and release is an affirmative defense.[9] Motions to dismiss generally test the sufficiency of complaints and not the validity of defenses.[10] Thus, in the absence of an unassailable admission in the complaint that the release was genuine, the respondents'

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[8] *See Hall v. Diversified Trading Systems, Inc.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,131 at 41,751 (CFTC July 7, 1994) (holding that an order of dismissal was excessive for a *pro se* complainant who failed to meet a deadline to amend her complaint, failed to comply with the respondent's discovery requests, and filed no response to the respondent's motion to dismiss). *See also Alexander,* [1994-1996 Transfer Binder] ¶26,467 at 43,057-58 (holding that it would be "unduly harsh" to deprive the complainant of a decision on the merits despite numerous late filings, the failure to comply with orders, the repeated failure to serve the respondents, the failure to perfect his appeal, and more).

Indeed, in its pursuit of procedural laxity the Commission has on an increasing number of occasions simply ignored its own published rules of agency. *Compare* 17 C.F.R. §12.312(d)(1) ("...the ALJ may, in his discretion, order that the direct testimony of the parties and their witnesses be presented in documentary form, by affidavit, interrogatory, and other documents."), *and* 17 C.F.R. §12.311 ("If the ALJ determines that documentary proof . . . permit[s] resolution . . . without the need for oral testimony, he may order that proof . . . be submitted in documentary . . . form, and dispose of such issues without an oral hearing."), *with Anderson v. Beach,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,763 at 61,604 (CFTC Feb. 14, 2008) (holding that the ALJ abused his discretion by requiring written direct testimony: "The Commission . . . never contemplated that reparations claims heard by an ALJ would be established . . . wholly via written direct testimony.").

[9] *Yeager v. Jedlicki,* [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶29,935 at 56,841 (CFTC Dec. 16, 2004).

[10] *Id. See also Brooks v. City of Winston-Salem,* 85 F.3d 178, 181 (4th Cir. 1996) (holding that dismissal is nevertheless appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense); *Weiler v. Household Fin. Corp.,* 101 F.3d 519, 524 n.1 (7th Cir. 1996).

motion was better suited for a summary disposition proceeding.[11] Given the respondents' *prima facie* showing, we converted the motion and instructed Hillpot that the burden had shifted to her to present evidence tending to disprove the validity of the release.[12]

Summary disposition is proper (and required) only if the pleaded facts, affidavits, other verified statements, admissions, stipulations and matters of official notice show that: (1) there is no genuinely disputed issue of material fact, (2) there is no need to further develop the record, and (3) the moving party is entitled to a decision as a matter of law.[13]

In determining whether these standards are met, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor."[14] In addition, if there is "any significant doubt that the parties' dispute can be reliably resolved without a hearing, summary disposition is . . . not appropriate."[15] However, when a motion is adequately supported, "an adverse party may not rest upon mere allegations, but shall serve and file in response a statement setting forth those material facts as to which [s]he

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[11] *Yeager,* [2003-2004 Transfer Binder] ¶29,935 at 56,841.

[12] *Hillpot,* [Current Transfer Binder] ¶30,931 at 62,324-25.

[13] 17 C.F.R. §12.310(e); *Levi-Zeligman v. Merrill Lynch Futures, Inc.,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,236 at 42,031 (CFTC Sept. 15, 1994).

[14] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

[15] *Levi-Zeligman,* [1994-1996 Transfer Binder] ¶26,236 at 42,031.

contends a genuine issue exists, supported by affidavits and other verified material."[16]

Hillpot has not met this burden. Although she could submit any evidence she wished, we specifically directed her[17] to "include an affidavit clearly stating whether the signature on the release is hers."[18] While Hillpot responded with an affidavit, she defied our directive.[19] Hillpot's pointed refusal to admit or deny that the signature was hers leaves us confident that there is no genuine issue of material fact as to the authenticity of the release. Thus, the only material issue remaining is whether the release is voidable.

If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.[20] Although her submissions are a muddle, they contain accusations of deceit and omissions by Dorrity on issues tangential to the genuiness of the release. For instance, she repeatedly accuses Dorrity of lying about leaving her copies of the release.[21]

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[16] 17 C.F.R. §12.310(b).

[17] And did so in "plain English." *Pozniko v. Burton*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,932 at 62,325 (CFTC Sept. 30, 2008).

[18] *Hillpot*, [Current Transfer Binder] ¶30,931 at 62,325.

[19] *See* Complainant's General Affidavit, dated October 30, 2008 ("Affidavit").

[20] RESTATEMENT (SECOND) OF CONTRACTS §164(1).

[21] Complaint at 4-5; Affidavit at 3.

Even if this is true, it is hardly relevant to whether the release is valid and enforceable.

Hillpot claims that "there was no conversation during our September 6, 2006 meeting between myself and Respondent Dorrity that I agreed to accept the $2,000 in return to settle this dispute."[22] She also says that "Dorrity never talked about settlement and release which would stop me from trying to file a complaint against him."[23] These allegations do not assist Hillpot's cause.

Hillpot never once mentions some fraudulent or material misrepresentation on which she relied – much less justifiably relied – that induced her to sign the release. Instead, she refers exclusively to statements that Dorrity did *not* make. There is an unbridgeable gap between a description of what was *not* discussed and an affirmative accusation that Dorrity tricked her into releasing her claims. There can be no limit to the number or kind of statements that someone does not make, and Dorrity's purported silence does not impact the validity of this clear and simple release. Dorrity could very well have sent a deaf, dumb, and blind messenger to mutely hand her the two-page agreement titled in all caps "SETTLEMENT AND RELEASE AGREEMENT." When she signed it, she agreed to abide by its terms. Absent a direct allegation – much less supporting material facts – that Dorrity tricked her into signing the

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[22] Affidavit at 2.

[23] *Id.*

release, we must uphold the parties' written agreement and find for the respondents.

Hillpot also says that "... I signed a document for release of Respondent Dorrity's commission but not a document which gave up my rights to pursue this complaint."[24] Because she does not dispute that the signature on the release is hers, we infer from this statement that she did not intend to release her claims, or perhaps that she believes the release does not in fact release her claims.

If she is arguing that she never intended to release her claims, her argument is without merit. It would be saying, in effect, that that she did not intend to agree to the plain terms of the contract.[25] Unreasonable, unilateral mistakes do not void a contract.[26]

If Hillpot is disputing the legal effect of the release, her understanding is incorrect. The release she signed is clear and concise. It expressly releases the respondents from all claims that:

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[24] Affidavit at 4.

[25] *New York Cent. R. Co. v. Mohney*, 252 U.S. 152, 157 (1920) (holding that the mental purpose of one of the parties to a written contract cannot change its terms).

[26] *E.g.*, 27 RICHARD A. LORD, WILLISTON ON CONTRACTS § 70:93 at 1 (4th ed.) (stating that absent some fraud or misrepresentation, unilateral mistakes do not support reformation); RESTATEMENT (SECOND) OF CONTRACTS § 153 Comment (a) (1981) (stating that courts have traditionally been reluctant to allow a party to avoid a contract on the ground of mistake, even as to a basic assumption, if the mistake was not shared by the other party).

> Michelle Hillpot did or could have asserted against Fidelity Planning Group, Crossland LLC, and Terry Dorrity, including any and all claims arising out of the handling of any of Michelle Hillpot's commodity trading accounts.[27]

Contracts are written to memorialize an agreement, in large part to prevent situations just like this – later disputes over a contract's terms. If Hillpot could repudiate a contract entitled "SETTLEMENT AND RELEASE AGREEMENT" nearly two years after the fact simply by saying "he didn't tell me it was a settlement and release agreement and I understood it to be something else," then no person could ever assume the enforceability of a contract[28] and the "security that one seeks from having a written statement of

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[27] Motion to Dismiss, Exhibit A.

[28] The Seventh Circuit has explained:

> The rule that bars the introduction of extrinsic evidence when a contractual provision is more or less clear "on its face" instantiates the broader principle that . . . parol or extrinsic evidence is admissible to interpret but not to contradict or alter the written contract. If the written contract is clear without extrinsic evidence, then such evidence could have no office other than to contradict the writing, and is therefore excluded. The object in excluding such evidence is to prevent parties from trying to slip out of their clearly stated, explicitly assumed contractual obligations through self-serving testimony or documents.... Contractual obligations would be too uncertain if such evidence were allowed.

In re Envirodyne Indus., 29 F.3d 301, 305 (7th Cir. 1994) (citations omitted).

one's legal rights and duties would be destroyed."[29]

It is clear under the agreement that Hillpot released her right to sue. It is similarly apparent that Hillpot has proposed no material fact that supports a claim of fraud related to the procurement of her signature. Correspondingly, we hold that there is no need to further develop the record.

The only material issue then remaining is merely whether a facially valid settlement and release is enforceable against a party who signed it. Clearly, it is. We hold, therefore, that the respondents are entitled to a decision in their favor as a matter of law.[30] The respondents' motion for summary disposition is **GRANTED**.

Costs

The respondents have twice requested their costs for being forced to defend a suit on a released claim.[31] In our order denying the respondents' motion to dismiss, we noted that if we found that Hillpot had sued on a

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[29] The purpose of the "four corners" rule "is to protect contracting parties from the uncertainty that would attend their obligations if a judge or jury were free to consider evidence that would contradict the terms of a written contract." *Mathews v. Sears Pension Plan,* 144 F.3d 461, 466 (7th Cir. 1998).

[30] *See J.S. Sweet Co., Inc., v. Sika Chem. Corp.*, 400 F.3d 1028, 1032 (7th Cir. 2005) (stating that when the language of a written contract is not ambiguous, its meaning is a question of law for which summary judgment is particularly appropriate); *Cunningham*, [Current Transfer Binder] ¶30,780 at 61,677.

[31] *See* Answer of Both Respondents, dated July 30, 2008, at 10; Motion to Dismiss at 2.

released claim, we would consider awarding costs.[32] Under Rule 12.314(c), we now consider doing so.[33]

The American Rule governs the award of attorneys' fees in reparations proceedings.[34] Its purpose is not only to compensate respondents for the cost of a suit brought in bad faith, but to deter potential complainants from bringing such suits in the first place.[35] Under this rule, fees may be awarded against a party that has engaged in litigation-related misconduct.[36] "Misconduct" includes circumstances in which a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons.[37]

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[32] *Hillpot*, [Current Transfer Binder] ¶30,931 at 62,325.

[33] Rule 12.314(c) provides:

> Except as provided in §§12.30(c) and 12.315 of these rules, the Administrative Law Judge may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered.

17 C.F.R. §12.314(c).

[34] *See Pal v. Reifler Trading Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,237 at 45,978 (CFTC Feb. 2, 1998).

[35] *Carr Investments, Inc. v. CFTC*, 87 F.3d 9, 13-15 (1st Cir. 1998).

[36] *Id.*

[37] *Bianco v. Cytrade Financial, LLC*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,933 at 62,327 (CFTC Sept. 30, 2008); *Davis v. Carr Investments, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,215 at 41,966 (CFTC Sept. 1, 1994); *Sherwood v. Madda Trading Co.*,

(continued..)

Assuming everything Hillpot has said to be true – that she did not knowingly sign a release,[38] that she thought the payment was not in settlement but just to assuage Dorrity's guilty feelings,[39] that she was not left copies,[40] etc., – she still knew well before she sued that a contract entitled "SETTLEMENT AND RELEASE AGREEMENT" exists. Moreover, once she saw a copy, she had knowledge that it contains what appears to be her signature. And despite multiple opportunities and a specific instruction, she has not denied that the signature is hers.

Further, she was told by the Pennsylvania Securities Commission before bringing this suit that she had settled and released her claims,[41] and by an attorney that she could not sue for that reason.[42] Despite the signed release and the advice of an attorney, she sued, demanding $99,000 in damages – failing to subtract the money she had already received in settlement. As the

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(..continued)

[1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,728 at 23,023 (CFTC Jan. 5, 1979).

[38] *See* Complaint at 4-5.

[39] *Id.*

[40] *Id.*

[41] "Eileen Vargo from the Pennsylvania Securities Commission faxed me copies of these documents. This is when she told me that I settled and released Mr. Dorrity...." *Id.* at 4.

[42] "I was advised by a lawyer that since I signed the release and settlement agreement I was not able to pursue a lawsuit for my losses." *Id.* at 5.

case progressed, she responded to neither the respondents' motion to dismiss nor their discovery requests.

Nevertheless, we decline to impose on Hillpot the respondents' costs. Hillpot has argued – quite generically – that the release does not preclude her from suing in reparations. While her belief in this respect is not remotely enough to survive a motion for summary disposition, it may still be genuinely held. The prerequisites for the imposition of costs each requires negative intent. Although Hillpot has made numerous mistakes, we hold that we have insufficient evidence that Hillpot acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

The evidence is insufficient for three reasons. First, Hillpot included a copy of the release with her complaint and addressed its existence therein. This indicates that she was being open and honest about her situation and simply did not understand the legal ramifications of a facially valid release.

Second, we note the procedural history. After Hillpot filed her complaint, the Office of Proceedings properly sent her a deficiency notice that, among other things, asked her to clarify the circumstances surrounding the release.[43] Hillpot replied with an addendum to her complaint; though she did not explain whether the signature on the release was hers, she did attempt to address the

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[43] Letter to Michelle Hillpot from the Office of Proceedings, dated May 29, 2008, at 2.

concerns of the Office of Proceedings.[44] We cannot conclude that the ultimate legal irrelevance of her additional statements was a matter of design.

The respondents then moved to terminate consideration of proceedings on the released claim.[45] Without ruling on that motion, the Office of Proceedings forwarded the case to us. Thus, despite lacking an explicit ruling in her favor, it was logical for Hillpot to conclude that her case was at least sufficiently meritorious to survive dismissal at that stage. Accordingly, the procedural history does not support a finding that her pursuit of the case to this point has been in bad faith.

Third, although she seems to purposefully include some irrelevancies in her filings, perhaps playing for sympathy, she – like Dorrity – has made no affirmative and untrue material statement on the subject of the release. She never directly denied that the signature on it was hers. Had she sworn that the signature was not hers and the case had proceeded, we might have found that she had, in fact, signed the release. In that circumstance, we would have awarded costs.

We hold that there is insufficient evidence of Hillpot's negative intent to award costs to the respondents. Each party will bear its own costs.

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[44] Letter to the Office of Proceedings from Michelle Hillpot, dated June 9, 2008.

[45] Motion by Both Respondents for Termination of Consideration of Proceedings, received July 1, 2008.

Accordingly, the respondents' motion for summary disposition is **GRANTED**, their request for costs is **DENIED**, and the complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

On this 3rd day of December, 2008

Bruce C. Levine
Administrative Law Judge